IN THE

Supreme Court of the United States

..... TERM, A. D. 1940.

No. 643

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, A NEBRASKA CORPORATION,
Petitioner,

vs.

ANTONIA P. MICCOLIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

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SUBJECT INDEX.

TABLE OF CASES AND STATUTES.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner, Mutual Benefit Health & Accident Association, a corporation organized under the laws of the State of Nebraska, respectfully represents:

Matter Involved.

This action was removed to the District Court of the United States for the Northern District of Indiana and was prosecuted to recover upon a policy of accident insurance on the assessment plan, issued by petitioner on December 10, 1931 to one Paul Miccolis, who was assassinated on March 29, 1934.

Respondent was the beneficiary named in said policy. The case was tried before a jury, resulting in a verdict and judgment for respondent for $5,000.00, the face of the policy, plus interest. Petitioner appealed to the Circuit Court of Appeals for the Seventh Circuit, and opinion and judgment was rendered by said Court on October 28, 1940, affirming the judgment of the District Court. Petitioner's Petition for Rehearing was overruled by the Circuit Court of Appeals on November 20, 1940.

The policy (printed in Appendix) was issued upon a written application, a copy of which was attached to and made a part of it. Petitioner-defendant interposed defenses on the ground that in the written application assured made false statements concerning prior accident insurance, in that he concealed the existence of an accident insurance policy issued to him by the Federal Life Insurance Company in January, 1931, and cancelled by it in November, 1931, and further concealed the payment of benefits to him under said policy in March, 1931. He further misrepresented his true occupation, stating the same to be that of the proprietor of a grocery store with office duties only, whereas he was active as a member of a ring engaged in illicit liquor traffic, in which his sales of sugar and yeast for a given period amounted to more than ten times the legitimate sales of his grocery store. He was prosecuted by the United States and by the State of Indiana, and convicted and punished for conspiracy and other violations of the National Prohibition Laws. These defenses were proved without dispute. There was also evidence that petitioner-defendant had re-tendered premiums upon discovery of the falsity of the statements in the application. This evidence was disputed.

A particular point was made in the trial court and upon appeal to the Circuit Court of Appeals of the refusal of the District Judge to give an instruction tendered by the defendant, your petitioner, as follows (R. 198-203):

"Instruction No. 6.

> If you find from the evidence that the defendant tendered the return of the premiums with lawful interest within a reasonable time after discovering the facts on which it denies liability, or if you find that such tender was not made, but that if it had been made it would have been unavailing because the plaintiff refused to accept anything less than Five Thousand ($5,000.00) Dollars, then your verdict should be for the defendant."

The District Judge modified this instruction by striking out the words "then your verdict should be for the defendant" and substituted the words "she cannot now be heard to complain of the nature of or failure of the tender." (R. 198.)

The respondent-plaintiff requested the District Judge to instruct the jury that all defenses against the policy were foreclosed by the Indiana statute forbidding the contest of a life insurance policy after it has been in force for two years from its date. The District Court refused so to charge, but charged that the policy was one of accident insurance and not governed by the life insurance statute.

The Circuit Court of Appeals differed with the District Court in this respect, and held that the policy was, so far as death benefits were concerned, one of life insurance and governed by the incontestability provisions of the life insurance statute of Indiana. (R. 235) It therefore affirmed the judgment without considerating the merits of the appeal, which hinged upon the refusal of the instruction as tendered, and the refusal to enter judgment for petitioner notwithstanding the verdict.

Basis of Jurisdiction.

This Honorable Court has jurisdiction to grant the Writ prayed for under Section 240(a) Judicial Code (U. S. C. C. 347).

Questions Presented.

1. Whether Clause 3, Sec. 5, Ind. Acts 1909, Chap. 95 (Burns' R. S. '33, Old Vol. 8, § 39-801), requiring that a life insurance policy shall provide for its incontestability after it shall have been in force during the lifetime of the insured for two years from its date, shall be applied to a policy of accident insurance, issued on the assessment plan, carrying both disability and death benefits.

2. Whether, in view of the undisputed false representations in the application, the District Court should have submitted to the jury by instruction No. 6, tendered, only the question of fact whether the premiums were tendered back to beneficiary, or, if not, whether the evidence showed that tender would have been futile, and therefore was excused.

Reasons Relied Upon for Allowance of the Writ.

1. The Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions, particularly in that it has attempted to apply the incontestability provision of the life insurance statute of Indiana to a policy of accident insurance issued by an assessment company, which decision is in direct conflict with *Western Life Indemnity Co.* v. *Bartlett,* 84 Ind. App. 589 (1924); (transfer denied by Supreme Court).

2. The Circuit Court of Appeals has rendered a decision in conflict with the decisions of other courts of appeal on the same question.

3. The Circuit Court of Appeals erroneously refused to review the action of the District Court in refusing to limit the jury to inquiry as to whether tender of premium was made by petitioner before suit, or whether tender was excused because it would have been futile. This was presented by Petitioner's Instruction No. 6.

Your petitioner believes the aforesaid judgment of the Circuit Court of Appeals is erroneous and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress and the rules of this Honorable Court in such cases made and provided.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled "Antonia P. Miccolis *vs.* Mutual Benefit Health & Accident Association, a Nebraska corporation, No. 7279", to the end that said cause may be reviewed and determined by this Court as provided in Judicial Code § 240, or that your petitioner may have such other or further relief or remedy in the premises as to this Honorable Court may seem appropriate and in conformity with the said Act, and that the said judgment of the United States Circuit Court of Appeals and the District Court may be reversed by this Honorable Court, and the case be remanded for further proceedings.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, a Nebraska corporation,
Petitioner,

By L. L. Bomberger

John H. Marthland

Its Attorneys.

SUPPORTING BRIEF.

Opinion of Court Below.

Is in the Record, page 232 It has not yet been published.

Jurisdiction.

See Petition.

Statement of the Case.

Petition, pages 1-3.

Questions Presented.

Petition, page 4.

Assigned Errors.

1. The Circuit Court of Appeals for the Seventh Circuit erred in holding that the accident insurance policy involved herein, issued on the assessment plan, is governed by Clause 3 of Sec. 39-801 Burns 1933 Old Vol. 8, which makes a policy of life insurance incontestable after it shall have been in force during the lifetime of the insured for two years after its date.

2. The District Court erred in refusing to give the jury petitioner's tendered instruction No. 6, as tendered, but modified the same so as to render it meaningless.

SUMMARY OF ARGUMENT.

Point A.

The Circuit Court of Appeals erroneously decided a question of local law and contravened local decision by applying to the policy in question the provision of the Act of 1899 (Burns' R. S. Old Vol. 8, Sec. 39-801, Chap. 3), requiring in life policies an incontestable clause (among thirteen standard requirements). Petitioner was a company engaged in the business of accident insurance upon the assessment plan, which was governed exclusively by the Act of 1897 (Burns' R. S. Old Vol. 8, Sec. 39-430).

Point B.

Other Courts of Appeal have construed similar statutes contrary to the decision herein of the Seventh Circuit.

Point C.

The evidence was undisputed that insured concealed in his application the payment of benefits under a previous accident insurance policy and the cancellation of such policy.

There being a dispute in the evidence on the question of tender of premiums to beneficiary-respondent, the District Court should have submitted petitioner's Instruction No. 6, to the effect that if they found that tender was made, or if not made, would have been futile, the verdict should be for defendant.

ARGUMENT.

Point A.

In *Western Life Indemnity Co.* v. *Bartlett*, 84 Ind. App. 589 (1924), the Appellate Court of Indiana decided that Clause 6 of the standard provisions section (printed in Appendix) (Act of 1899 as amended in 1909, Burns R. S. Old Vol. 8, Sec. 39-801) did not apply to policies of life insurance companies doing business on the assessment plan. The Court said (607):

> "While the policy sued on provides for a fixed monthly premium, it also provides that if the premium so fixed is not sufficient to meet the requirements of the policy, the company reserved the right, in compliance with the law, to call for the difference necessary to meet such requirements and to fix the time for the payment thereof. This clearly indicates that the policy was issued by a company doing business on the assessment plan. See § 8989 Burns 1926, [39-426, R. S. 1933, Old. Vol. 8] § 4744 Burns 1914, Acts 1897, p. 322, § 6. Section 9036, *supra*, is not applicable to a company doing business on the assessment plan. See, also § 8950 Burns 1926 [39-235, R. S. 1933, Old Vol. 8] § 4706 Burns 1914, Acts 1899, p. 30, § 29, as amended by Acts 1909, p. 251, § 4."

The Supreme Court of Indiana refused to transfer this case.

The decision of the Appellate Court was supported not only by Sec. 29, Acts 1899, Burns' Old Vol. 8, Sec. 39-235, but by Sec. 10 of the amending act of 1909, which is Burns' Old Vol. 8, Sec. 39-806, reading:

> "This act shall not apply to annuity or industrial policies or to corporations or associations operating on the assessment or fraternal plan."

It was also supported by the apparent legislative intent to distinguish between accident policies with death in-

demnities and policies of life insurance, for in the Act of 1897, Chap. 195, p. 318, there are contained two sections which set up the difference.

Section 6 of this Act (Burns R. S. Old Vol. 8, Sec. 39-426) defines in detail what shall constitute the business of life insurance upon the assessment plan. *Section* 7 (39-427) prescribes a method of setting up a reserve fund by such companies. *Section* 10 (39-430) of the same Act prescribes the qualifications for doing the business of accident insurance upon the assessment plan. *Section* 11 (39-431) prescribes the method by which such companies shall set up reserve.

If an assessment life policy is expressly excluded from the Standard Provisions Act, certainly an assessment accident policy cannot be brought under the statute by implication.

Furthermore, *Section* 1 of the amendment (Burns R. S. Old Vol. 8, Sec. 39-201) enlarged the original Section 1 above mentioned to permit the making of insurance upon the lives of individuals and every insurance appertaining thereto and connected therewith, adding these words:

> "* * * including insurance against permanent mental or physical disability resulting from accident or disease, or against accidental death, *combined* with a policy of life insurance, * * *"

thus permitting for the first time the combination in or with a life policy of additional coverage against accident. The fact that the two might be combined as stated in the statute is of significance, particularly so, since Section 1, Acts 1899, amended 1909, is in the same act as the standard provisions section.

That the policy in question is that of an assessment association doing an accident business is clearly disclosed by ite terms, to-wit:

> "INSURING CLAUSE. Mutual Benefit Health and Accident Association, Omaha, * * * does hereby insure

Paul Miccolis * * * of the City of Gary, State of Indiana, against loss of life, limb, sight or time, resulting directly and independently of all other causes, from bodily injuries sustained through purely accidental means." (Appendix, pp. 21 and 22.)

* * * * *

"(c) The copy of the application endorsed hereon is hereby made a part of this contract and this policy is issued in consideration of the statements made by the Insured in the application and the payment in advance of Twenty-seven ($27.00) Dollars as first payment; and the payment in advance of premiums of Seventeen ($17.00) Dollars quarterly or Sixty-eight ($68.00) Dollars annually thereafter, beginning with April 1, 1932, is required to keep this policy in continuous effect. If any such dues be unpaid at the office of the Association in Omaha, Nebraska, this policy shall terminate on the day such payment is due. * * *

The acceptance of any premium on this policy shall be optional with the Association and should the premium provided for herein be insufficient to meet the requirements of the Association, it may call for the difference as required." (Appendix, pp. 28 and 29.)

A-1.

The Circuit Court of Appeals in its opinion cites three Indiana cases which we shall discuss briefly. The first is *State* v. *Willett*, 171 Ind. 296 (1908). This decision turned upon the construction of a criminal statute (Burns 1908, Sec. 4713, Acts 1901, p. 374), which, in substance, made it an offense to write a policy of insurance upon the life of an individual

> "unless the beneficiary named in such policy shall have a bona fide insurable interest, in whole or in part, in the life of such insured, * * * and unless the person so insured shall have first passed a satisfactory medical examination." (374.)

An organization known as the Greenfield Mutual Burial Association issued a certificate or policy naming C. W. Morrison & Son "the official undertakers of this association" as beneficiary. The Court held that the issuance of such certificate was in effect a policy on the life of

the named member and that the beneficiaries having no insurable interest, the statute had been violated. The question here raised was not involved.

The next case cited by the Circuit Court of Appeals is *Natl. Colored Aid Society* v. *State,* 208 Ind. 380 (1935). The question decided in this case was whether the portion of Burns' R. S. Old Vol. 8, Sec. 39-426, which is as follows:

> "* * * nothing herein contained shall be construed as applicable to any association of religious or secret societies, or to any class of * * * soldiers, formed for the mutual benefit of the members thereof and their families exclusively, or to any secret or fraternal societies, lodges or councils that may be organized, or that are now organized and doing business in this state, which conduct their business and secure members on the lodge system exclusively, having ritualistic work and ceremonies in their societies, lodges or councils, and which are under the supervision of the grand or supreme body, nor to any association organized solely for benevolent purposes and not for profit * * *"

applied to a burial society. The Court held it did not. The question therein raised is in no way involved in the case at bar.

The case of *Guardian Life Insurance Co.* v. *Barry,* 213 Ind. 56, 61 (1937) is the decision most relied upon by the Circuit Court of Appeals to sustain its decision. The question decided in the *Barry* case was whether or not the incontestable provision for life policies required by Burns' R. S. Old Vol. 8, Sec. 39-801 cl. 3 applied to a *rider insuring against disability* attached to a policy of life insurance, which policy of life insurance was admittedly governed by the incontestable provision. The Court held that the incontestable provision of the statute did not apply to the insurance against disability. The policy and the rider each called for its own separate premium. (Op. p. 60.) The life policy could be carried for a stated sum and the indemnity rider abandoned. It is common knowledge, we

take it, that health and accident indemnity riders on life policies are limited as to time and terminate when the insured reaches a stated age, although the life coverage continues to death if the life premium is paid. In the instant case, there was one stated premium for all coverage, subject only to additional *assessments* to cover the one designated risk that is, accident, whether the result was disability or death.

Moreover, the policy could never come within the protection of the incontestability statute because it expressly provides that the acceptance of any premiums shall be optional with the association. By the exercise of this option the association could end any policy at any time, regardless of the years it had been in force. But the Circuit Court of Appeals applies a two-year incontestable clause to what may be, at the option of the insurer, a one-year policy.

Nothing in the *Barry* case supports the holding of the Court of Appeals that a policy insuring against accident for a stated premium may be divided into two policies, one accident and the other life, nor, much less, that the division takes place when the result of the accident has been determined. Neither is there anything in the decision that can be construed to apply the standard provisions to a policy issued on the assessment plan.

In its opinion the Circuit Court of Appeals says (Op. p. 4, R. 235):

> "In passing, however, it may be observed, as to the 1935 amendment, that it recognizes the law of Indiana to be as stated in the Barry case."

In connection with this observation by the Court, it is to be remembered that the legislature, in passing the Act of 1935, provided for different standard provisions in policies against death by accident and life insurance policies. The standard provisions for a policy of life insurance are found in Burns R. S. 1933, New Vol. 8, Sec. 39-4206, while

the standard provisions for policies against accidental death are contained in Burns R. S. 1933, New Vol. 8, Sec. 39-4306. It is respectfully submitted that in thus distinguishing between a policy of life insurance and a policy against accidental death, the legislature, instead of recognizing the law to be as in the *Barry* case, was carrying on the historic legislative policy of the State of Indiana.

But if the Act of 1935 is to be our guide, it clearly shows the untenable position taken by the Circuit Court of Appeals. In this Act there are standard provisions for health and accident policies. (Burns R. S. New Vol. 8, Sec. 39-4306.) Excerpts from this section are printed in the appendix hereto. Attention is called to the opening sentence of this section:

> "On and after the first day of July, 1935, no policy of insurance against loss or damage from sickness, or the bodily injury or death of the insured by accident, shall be issued * * *" etc.

Standard provision requirements are set out, among them being

> "(A): 11. Indemnity for loss of life of the insured is payable to the beneficiary if surviving the insured and otherwise to the estate of the insured. All other indemnities of this policy are payable to the insured.
>
> * * * * * *
>
> 16. The insurer may cancel this policy at any time by written notice delivered to the insured" etc.

The Act also contains the standard provisions requirements of life insurance policies. (Sec. 39-4206.) This contains, among other things, a two-year incontestability provision. Obviously the two standard provisions requirements are inconsistent and not applicable to the same policy. But the Circuit Court of Appeals holds in effect that the standard provisions of life policies are to be applied to accident policies with death benefits. The Court would certainly not eliminate the standard provisions requirements of accident policies. So in effect, it sets up by judicial construction two

sets of standard provisions for accident policies but then only in the event that death indemnity is claimed under such policy.

POINT B.

But if it did not appear that the Circuit Court of Appeals has rendered a decision contrary to the controlling Indiana authority, it conflicts with the holdings of other Circuit Courts of Appeal. In the interest of uniformity, the attention of the Court is respectfully called to some of these decisions. In doing so it is recognized that some Circuit Courts of Appeal have construed general statutes relating to policies of life insurance to apply to both life and accident policies, where death resulted. But we believe that in all such cases they have been required to do so by reason of the decision of the highest court of the state to that effect.

See *Continental Casualty Co.* v. *Agee*, 3 Fed. (2d) 978, (1924), in which Your Honors set aside an order granting certiorari to the Eighth Circuit after the Supreme Court of Utah decided the question. 269 U. S. 551.

Therefore, as the matter is open from that standpoint, it is submitted that there is a conflict between the instant case and decisions of other Courts of Appeal.

In *United Comml. Trav.* v. *Edwards*, (10 C. C. A.) 51 Fed. (2d) 187, (1931), the Court considered the statute of Oklahoma requiring life policies to carry a copy of the application. The contest was over a certificate in a benefit society. Referring to the section relied upon by the plaintiff, the Court said (p. 190):

> "• • • A mere reading of all of section 6731 demonstrates, beyond peradventure of doubt, that it deals only with life insurance policies, and has nothing to do with accident insurance. The first sentence of the section reads 'No policy of life insurance shall be issued,' etc. The sections preceding and following deal exclusively with life insurance. But still more convinc-

ing is the section itself. It requires that all life insurance policies shall provide in substance (among other things) that if the age of the insured has been misstated, the policy or the premium shall be adjusted to correspond; that the policy shall participate in the surplus of the company, and for the manner of paying dividends to the policyholder; that after three premiums have been paid, there shall be a specified loan value; that in case of default in payment of premiums after three years, the insured shall be entitled to the reserve on the policy in certain optional forms. There are other provisions, but these are sufficient to demonstrate that the section can have no possible application to accident policies, the premiums on which are not graduated by the age of the insured, which do not participate in the surplus of the company, which pay no dividends, which have no reserve values, and which afford the insured no unqualified right to keep the policy in force by the payment of premiums."

he statute of Oklahoma thus construed by the Tenth Cirit is practically identical with the Indiana Standard Prosions Act. (Burns' R. S. Old Vol. 8, § 39-801.)

In *Fidelity & Cas. Co.* v. *Dorough*, 107 Fed. 389 (1901), e 5th C. C. A., in holding that a Texas statute imposing a enalty for delay in settling a claim under a life or health olicy did not apply to an accident policy, said:

"* * * Outside of the defining statute quoted, it is common knowledge that the one insures against the inevitable, with the intent that eventually the amount of the policy shall be paid to the beneficiary; the other insures against the accidental, with the intent that the liability of the insurance company to pay the amount or amounts stipulated shall attach only on the occurrence of bodily injuries to the insured, sustained through external, violent, and accidental causes. The distinction between accident insurance and health insurance is equally clear. Accidental injury may happen; sickness and infirm health may be considered as inevitable. In the one the amount of indemnity stipulated may never become due; in the other, if the policy is kept in force the indemnity stipulated is certain to become due."

In *Mutual Reserve Life* v. *Dobler,* 137 Fed. 550, (1905) the 9th C. C. A. held that failure to disclose existing *accident* insurance in an application for *life* insurance was not an irregularity because:

> "* * * In the ordinary understanding and usage there is a well-defined distinction between life insurance and accident insurance. In the latter the contract is to pay a fixed sum in case of death resulting from external, violent, and accidental means, and ordinarily for the payment of a fixed sum periodically during incapacity caused by accidental injury. The policy covers a short period of time, ordinarily not longer than a year. * * *"

In *Standard Life & Accident Ins. Co.* v. *Carroll,* 86 Fed. 567 (1898), the Third Circuit Court of Appeals decided that the Pennsylvania Act requiring copies of the application to be attached to the policy, or that otherwise contest by insurer would not be permitted, did not apply to an accident policy, although it expressly named all life and fire insurance policies upon lives or property. The Court said (569):

> "* * * Presumably, the legislature intended to exclude from the operation of the act the classes of insurance policies not named. The suggestion that the act includes policies of insurance against bodily accident seems to us to be quite inadmissible. The instrument sued on here is strictly an accident insurance policy. The form of the policy is that commonly used in insurance against bodily accidents. The primary purpose is to secure a weekly indemnity in money to the insured in the event of his disability from accidental injury. In certain specified contingencies, resulting from accidental injury, a specified gross sum is to be paid. In some of these resulting contingencies the stipulated specific payment is a proportionate part of the principal sum named in the policy, and in other contingencies the whole principal sum is to be paid. One of the latter is death resulting from the accident within 90 days thereafter. But this contingent provision does not make the instrument a life insurance policy, either in a popular or in a legal sense. * * *"

Flannagan v. *Provident Life & Accident Ins. Co.,* 22 Fed.

(2) 136 (1927), indicates that the Fourth Circuit Court of Appeals is like-minded with the Third, Fifth, Ninth and Tenth. While the Court puts its decision upon the ground that there was no coverage of the accident sustained by the insured, it nevertheless said that the Virginia statute preventing contestability of a life policy for any cause after one year from the date thereof, applied only to life insurance policies and not to accident insurance, even though the coverage was death by accident.

Point C.

After the death of the insured, petitioner made an investigation which disclosed the issuance and cancellation of another accident policy and payment of benefits thereunder (R. 59), all of which was concealed in the application. The questions and answers in the application are (R. 221):

> "9. Has any application ever made by you for life, accident or health insurance been declined?
>
> Answer as to each. No.
>
> Has any life, health or accident policy issued to you been cancelled? Answer as to each. No.
>
> Has any renewal of a life, accident or health policy been refused by any company or association? Answer as to each. No. If so, give full particulars. No.
>
> 10. Have you ever made claim for or received indemnity on account of any injury or illness? If so, give companies or associations, dates, amounts and causes. No."

There is no denial that these answers were false. Insured was killed on March 29, 1934. On May 6th petitioner's agent interviewed respondent-beneficiary at her home. There is dispute as to just what was said between them, but there is evidence that he wrote a draft for return of premium and interest, and tendered it to her (R. 109-110). The evidence is undisputed that respondent steadfastly refused to accept anything except the face of the policy (R.

159-162-163). There is also disputed evidence that again the following August the draft was re-tendered plus $100.00, which was again refused by respondent (R. 175).

From these facts, whether undenied or disputed, the jury had a right to find that a tender was made if it believed petitioner's witness. It also had the right to find that the attitude of respondent was such that even if no tender were made, it would have been futile had it been made. So that whether the tender was made, or would have been futile, the concealment of prior insurance benefits and cancellations was sufficient to void the policy.

Petitioner-defendant, acting upon the theory that the evidence of fraud being undisputed, therefore the only question for the jury was tender of premium, tendered instruction No. 6 (R. 203) which permitted the jury to find the facts as to tender either way, but attempted to guide them in reaching a result. It said that if a tender were made and refused, or in the alternative, if it were not made but it would have been futile had it been made, the defendant was entitled to a verdict. The District Court, however, had a different idea about the effect of these findings and struck out the words

> "then your verdict should be for the defendant"

and concluded the instruction by saying

> "plaintiff cannot now be heard to complain of the nature of or failure of the tender" (R. 198).

By so changing the instruction, the Court completely destroyed its effect.

There was but one issue to submit to the jury and that involved the question of tender. If it was made and refused, that ended it. If it was not made, then petitioner-defendant had evidence from which the jury could find that had it been made, it would have been futile, which futility excuses a tender in Indiana.

Blair v. *Hamilton* (1874) 48 Ind. 32; 35.
Lahr v. *Broyles* (1927) 86 Ind. App. 33; 37.

Petitioner was thus deprived of an instruction upon the theory that the only question to be submitted to the jury was that of tender. The District Court devitalized the instruction. It was without point or value as modified. This is an error of the District Court which patently was committed, and which the Circuit Court of Appeals, by its attitude on the incontestability question, refused to consider.

It is therefore respectfully submitted that certiorari should be granted and that upon further consideration of the case, this Honorable Court should reverse the judgment of both the Circuit Court of Appeals and the District Court.

L. L. Bomberger

John H. Northland

Attorneys for Petitioner.